The Board of Trustees of the Sabah Foundation & Anor v Zara Sdn Bhd

HIGH COURT (KOTA KINABALU) — NO K21–27 OF 2008-I
DAVID WONG J
30 SEPTEMBER 2009

Civil Procedure — Res judicata — Issues, similarity of — Certain issues raised and decided in two earlier suits — Whether plaintiffs' present cause of action sought proprietary remedy and was different to cause of action in two earlier suits — Whether new evidence discovered during cross-examination in two earlier suits supported plaintiffs' claim

Civil Procedure — Striking out — Application to strike out action — Whether plaintiff's cause of action res judicata — Whether plaintiffs' claim time barred — Rules of the High Court 1980 O 18 r 19 (1)(b) & (c)

The plaintiffs' cause of action in the present case was premised on evidence adduced from two other suits which the plaintiffs had started in 1979. In the first suit the plaintiffs and one Sinsuran Sdn Bhd had claimed against Datuk Syed Kechik ('DSK') and Zara Sdn Bhd ('the Zara suit') on the grounds that DSK as a director of the first plaintiff had acted in breach of his fiduciary duties by locating the Sabah Foundation Building on Zara's land. In the second suit which was instituted by the plaintiffs against DSK and Banita ('the Banita suit'), the plaintiffs cause of action was that DSK had acted in breach of his fiduciary duty to the first plaintiff when he failed to apply for a special timber licence for the Wallace Bay Area for the plaintiffs. As a consequence the plaintiffs claimed for all profits from the extraction of timber from the Wallace Bay Area pursuant to the special timber licence. The two suits were jointly heard by the High Court which held that DSK had breached his fiduciary duties as the plaintiff's officer and employee. In the Zara suit DSK was found liable to the plaintiffs for RM10,375,504 as compensation for loss of profits with interest. In the Banita suit the court awarded a restitutionary award of RM6,417,915 with compound interest at 8% from 1 January 1978 and interest at 8%pa from the date of judgment and a compensatory award of RM23,050,000. When the defendants appealed to the Court of Appeal the judgment of the High Court in the Zara suit was set aside but the restitutionary award of RM6,417,915 in the Banita suit was affirmed except that the compound interest element of 8%pa was set aside and replaced with a simple interest of 6%pa. However the compensatory

award in the Banita suit was set aside. Although appeals were lodged to the Federal Court, the decision of the Court of Appeal was affirmed by the Federal Court. The plaintiffs then instituted an action to trace the money that DSK made from his capacity as a director of the first plaintiff, which rightfully belonged to the plaintiffs. The plaintiffs submitted that this process of backwards tracing which gave them the right to follow the money that rightfully belonged to them was a proprietary remedy which was different to the cause of action in the Zara suit and the Banita suit. It was the plaintiffs' stand that new evidence discovered from DSK's brother at the trial during cross-examination gave support for the tracing remedy. The defendant had now applied to strike out this action commenced by the plaintiffs pursuant to O 18 r 19(1)(b) and/or (c) of the Rules of the High Court 1980 or alternatively under the inherent jurisdiction of the court. The defendant's application raises two issues, namely, whether the plaintiff's cause of action was res judicata on account of the appeals to the Federal Court in the Zara suit and/or the Banita suit; and whether the plaintiffs' claim was time barred.

Held, allowing the application with costs:

(1) Both this suit and the Banita suit referred to the same breach of fiduciary duty committed by DSK as found by the Federal Court and to the same exploitation of the timber concession in the Wallace Bay Area in which the plaintiffs were awarded restitutionary damages of RM6,417,915. As such this case was nothing but an attempt to litigate the same issue of law and facts which had been fully adjudicated. To allow this suit to proceed amounted to an attack on the judgment of the Federal Court which in law was not allowed unless the same had been obtained by fraud. Further, from the interchanges during the Zara suit and the Banita suit it was clear that the plaintiffs had tried to raise the same allegations in the two suits (see paras 14–15 & 17).

(2) The plaintiffs' attempt to use evidence arising from the cross-examination in the Zara and Banita trials did not entirely change any aspect of the case. The plaintiffs' present claim was nothing but an attempt to relitigate issues which had been adjudicated and the suit was thus barred by the principle of res judicata (see paras 23–24).

(3) There was no dispute that the plaintiffs' action was based on what happened in the 1970s, that is, 39 years ago. The plaintiffs were seeking an equitable remedy in this suit, and the rule of equity demands a plaintiff to prosecute his claim without undue delay. Due to the lapse of the long period of time the defendant had been prejudiced beyond repair in its ability to defend this suit. Further, there was no explanation by the plaintiffs as to why they had taken so long to prosecute their case in the manner they want to do now (see paras 26 & 28–29).

[Bahasa Malaysia summary

Kausa tindakan plaintif-plaintif dalam kes ini berdasar kepada keterangan yang dikemukakan daripada dua tindakan lain yang telah dimulakan plaintif-plaintif pada 1979. Dalam tindakan pertama, plaintif-plaintif mendakwa terhadap Datuk Syed Kechik ('DSK') dan Zara Sdn Bhd ('tindakan Zara tersebut') atas alasan-alasan bahawa DSK sebagai pengarah plaintif pertama telah bertindak melanggar kewajipan fidusiarinya dengan membangunkan Sabah Foundation Building di atas tanah Zara. Dalam tindakan kedua yang mana dimulakan oleh plaintif-plaintif terhadap DSK dan Banita ('tindakan Banita tersebut'), kausa tindakan plaintif-plaintif adalah bahawa DSK telah melanggar kewajipan fidusiarinya kepada plaintif pertama apabila dia gagal memohon lesen khas pembalakan di kawasan Wallace Bay bagi plaintif-plaintif. Akibatnya, plaintif-plaintif menuntut kesemua keuntungan daripada pembalakan di kawasan Wallace Bay berikutan daripada lesen khas pembalakan tersebut. Kedua-dua tindakan tersebut didengar bersama oleh Mahkamah Tinggi yang memutuskan bahawa DSK telah melanggar kewajipan fidusiarinya sebagai pegawai dan pekerja plaintif-plaintif. Dalam tindakan Zara tersebut, DSK didapati bertanggungan ke atas plaintif-plaintif sebanyak RM10,375,504 sebagai pampasan bagi kehilangan keuntungan bersama dengan faedah. Dalam tindakan Banita mahkamah memberikan award restitusi sebanyak RM6,417,915 dengan faedah kompaun sebanyak 8% dari 1 Januari 1978 dan faedah sebanyak 8% setahun dari tarikh penghakiman dan award pampasan sebanyak RM23,050,000. Apabila defendan-defendan merayu ke Mahkamah Rayuan, penghakiman Mahkamah Tinggi bagi tindakan Zara diketepikan tetapi award restitusi sebanyak RM6,417,915 dalam tindakan Banita disahkan kecuali elemen faedah kompaun 8% setahun diketepikan dan digantikan dengan faedah ringkas sebanyak 6% setahun. Tetapi award pampasan dalam tindakan Banita diketepikan. Walaupun rayuan-rayuan dimasukkan ke Mahkamah Persekutuan, keputusan Mahkamah Rayuan disahkan oleh Mahkamah Persekutuan. Plaintif-plaintif kemudiannya memulakan tindakan untuk mengesan wang yang dihasilkan oleh DSK dalam kapisitinya sebagai pengarah plaintif pertama, yang merupakan hak plaintif-plaintif. Plaintif-plaintif berhujah bahawa proses mengesan yang membolehkan mereka mengesan wang milik mereka merupakan remedi keempunyaan dan berlainan dengan kausa tindakan dalam tindakan Zara dan juga tindakan Banita. Adalah menjadi pendirian plaintif-plaintif bahawa keterangan baru yang ditemui oleh saudara DSK semasa pemeriksaan balas menyokong remedi pengesanan tersebut. Defendan kini memohon untuk pembatalan tindakan yang dimulakan oleh plaintif-plaintif ini berikutan dengan A 18 k 19(1)(b) dan/atau (c) Kaedah-Kaedah Mahkamah Tinggi 1980 atau alternatifnya di bawah bidang kuasa sedia ada mahkamah. Permohonan defendan membangkitkan dua isu iaitu sama ada kausa tindakan

plaintif-plaintif adalah res judicata atas dasar rayuan-rayuan ke Mahkamah Persekutuan dalam tindakan Zara dan/atau tindakan Banita; dan sama ada tuntutan plaintif-plaintif dihalang oleh had masa.

Diputuskan, membenarkan tuntutan dengan kos:

(1) Kedua-dua tindakan ini dan juga tindakan Banita merujuk kepada pelanggaran kewajipan fidusiari yang sama oleh DSK seperti yang diputuskan oleh Mahkamah Persekutuan dan juga ke atas eksploitasi konsesi balak di kawasan Wallace Bay yang mana plaintif-plaintif diawardkan ganti rugi restitusi sebanyak RM6,417,915. Oleh itu, kes ini adalah percubaan untuk membicarakan isu perundangan dan fakta-fakta yang sama yang telah diputuskan. Membenarkan tindakan ini diteruskan bermakna membenarkan bidasan terhadap penghakiman Mahkamah Persekutuan yang tidak dibenarkan kecuali jika keputusan tersebut adalah disebabkan oleh fraud. Malah daripada persilangan tindakan Zara dan Banita tersebut adalah jelas bahawa plaintif-plaintif telah cuba membangkitkan dakwaan-dakwaan yang sama dalam kedua-dua tindakan tersebut (lihat perenggan 14–15 & 17).

(2) Percubaan plaintif-plaintif untuk menggunakan keterangan yang berbangkit daripada pemeriksaan balas dalam perbicaraan tindakan Zara dan Banita tidak menukar mana-mana aspek kes tersebut. Tuntutan plaintif-plaintif kini hanyalah percubaannya untuk membicarakan semula isu-isu yang telah diputuskan dan oleh itu dihalang atas prinsip res judicata (lihat perenggan 23–24).

(3) Tidak dipertikaikan bahawa tindakan plaintif-plaintif adalah berdasarkan apa yang telah berlaku pada 1970an, 39 tahun yang lalu. Plaintif-plaintif memohon remedi ekuiti dalam tindakan ini, dan peraturan ekuiti mendesak plaintif memulakan tuntutannya tanpa berlengah-lengah. Berikutan dengan kelewatan masa yang melampau itu, defendan telah diprejudiskan untuk membela atas tindakan ini. Selanjutnya, tiada penjelasan oleh plaintif-plaintif mengapa mereka mengambil masa yang begitu lama untuk membicarakan kes mereka ini seperti sekarang ini (lihat perenggan 26 & 28–29).]

Notes

For cases on application to strike out action, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6696–6702.

For cases on issues, application of res judicata, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6076–6078.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (folld)

Board of Trustees of the Sabah Foundation, The & Ors v Datuk Syed Kechik bin Syed Mohamed & Anor [2008] 5 MLJ 469; [2008] 3 CLJ 221, FC (refd)

Chung Khiaw Bank (M) Bhd v Tio Chee Hing [2004] 3 CLJ 59, CA (folld)

Len Chee Omnibus Co Ltd Chin Sow Lan, Re v Lee Che Omnibus Co Ltd & Ors [1969] 2 MLJ 202, HC (refd)

Negara Properties Sdn Bhd v Akitek Bersekutu Malaysia (sued as a firm) & Ors [1995] 2 MLJ 185, HC (refd)

North West Water Ltd v Binnie ua Partners (a firm) [1990] 3 All ER 547, QBD (refd)

Superintendent of Pudu Prison & Ors v Sim Kie Chon [1986] 1 MLJ 494, SC (folld)

Yong Nyee Fan & Sons Sdn Bhd v Kim Guan & Co Sdn Bhd [1979] 1 MLJ 182, FC (refd)

Legislation referred to

Rules of the High Court 1980 O 18 r 19(1)(b), (1)(c)

Alex Decena (Wilson Lai with him) (Jayasuriya Kah & Co) for the plaintiffs. Douglas Lind (Lind Willie Wong & Chin) for the defendant.

David Wong J:

INTRODUCTION

[1] This suit is an offspring of Suit 351/1979 ('Zara suit') and Suit 352/1979 ('Banita suit'). The cause of action in this case is premised on evidence adduced in the Zara suit and Banita suit and they relate to events which had occurred in 1976–1978. Before me is an application by the defendant to strike out the plaintiffs' writ of summons and statement of claim pursuant to O 18 r 19(1)(b) and/or (c) of the Rules of High Court 1980 or alternatively under the inherent jurisdiction of this court. Suffice for me to just say that the court's power to strike out an action is used sparingly and only in plain and obvious case.

ISSUES

[2] From reading the application, the affidavits filed by respective parties and submissions of counsel the determinative issues are:

(a) Whether the plaintiffs' statement of claim is 'res judicata' on account of the outcome of the appeals to the Federal Court in either or both Zara and Banita suit?

(b) Whether irrespective of the answer to (a), the plaintiffs' statement of claim claims in this case is time barred?

Issue 1: *Whether the plaintiffs' statement of claim is 'res judicata' on account of the outcome of the appeals to the Federal Court in either or both Zara and Banita suit?*

[3] What amounts to 'res judicata' is stated in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189, by Peh Swee Chin FCJ:

> What is res judicata? It simply means a matter adjudged, and its significance lie in its effect creating an estoppel per rem judicatum. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted again to litigate once more the res judicata, because the judgment becomes the truth between them, or in other words, the parties should accept it as the truth, *res judicata pro veritate accipitur*. The public policy of the law is that, it is in the public interest that there should be finality in litigation — *interest rei publicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same cause of action.

[4] In dealing with this issue, I am also guided by the approach taken by the Court of Appeal in the case of *Chung Khiaw Bank (M) Bhd v Tio Chee Hing* [2004] 3 CLJ 59 where at p 62 said:

> The appellant then applied to strike out the respondent's claim pursuant to RHC O 18 r 19. It relied on several grounds. These included a plea of res judicata and an assertion that the action constituted an abuse of the court's process. As a matter of law, the latter ground is much wider than the former. A party to any proceedings may be unable to establish the requirements of the doctrine of res judicata. Yet, he may succeed in demonstrating that the particular suit or other proceeding or a step taken in a proceeding is an abuse of process and successfully apply to have it struck out on that ground. This was made clear by the Supreme Court in *Superintendent of Pudu Prison & Ors v Sim Kie Chon* [1986] 1 MLJ 494; [1986] 1 CLJ 548; [1986] CLJ (Rep) 256. Abdoolcader SCJ who delivered the judgment of the court said:
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> > There is moreover the inherent jurisdiction of the court in cases where res judicata is not strictly established, and where estoppels per rem judicatam has not been sufficiently pleaded, or made out, but nevertheless the circumstances are such as to render any re-agitation of the questions formally adjudicated upon a scandal and an abuse, the court will not hesitate to dismiss the action, or stay proceedings therein, or strike out the defence thereto, as the case may require. It would suffice in this regard to refer to the judgment of the Privy Council delivered by Lord Wilberforce in *Brisbane City Council and Myer Shopping Centres Pty Ltd v Attorney-General for Queensland* [1979] AC 411, at p 425.

A The second defence is one of 'res judicata'. There has, of course, been no actual decision in litigation between these parties as to the issue involved in the present case, but the appellants invoke this defence in its wider sense, according to which a party may be shut out from raising in a subsequent action an issue which he could, and should, have raised in earlier proceedings. The classic statement of this doctrine is contained in the judgment of Wilgram VC in *Henderson v Henderson* [1843] 3 Hare 100 and its existence has been reaffirmed by this board in *Hoystead v Commissioner of Taxation* [1926] AC 155. A recent application of it is to be found in the decision of the board in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581. It was, in the judgment of the board, there described in these words:

> … there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings (p 590).

D The attempt by way of the instant proceedings to relitigate and reopen the earlier action clearly reflects the appositeness of the caption suggested for this matter in the prelude to this judgment and would appear to us to be as clear an instance of an abuse of the process of the court as one can find within the connotation thereof E enunciated in the speech of Lord Diplock in *Hunter v Chief Constable of the West Midlands Police & Ors* [1982] AC 529, at p 542 ...

One manifestation of this power was to be found in RSC O 18 r 19, which empowered the court, at any stage of the proceedings, to strike out any pleading which disclosed no reasonable cause of action or defence, or which was scandalous, F frivolous or vexatious, or which was otherwise an abuse of the process of the court.

Where an abuse of process is alleged in reliance upon or in relation to any previous litigation between the parties or their privies, it is the duty of the court to undertake a minute examination of the history of the prior litigation. To do this does not offend O 18 r 19 in this particular context. As Peh Swee Chin SCJ said in *Raja Zainal* G *Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 CLJ 606, another abuse of process case:

> However, the learned judge in the court below, who is very experienced and very able, and who referred very much to the same issues, appears to be much exercised by the fact that the application was made under O 18 r 19, in reversing the learned H registrar's decision, in holding, on the facts of this case I consider that O 18 r 19 is not appropriate to shut out the plaintiffs from pursuing their claims.

The cautionary words are words which have been frequently employed in connection I with an application under O 14. It was unfortunate that the case of *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1, a Privy Council case was not cited in the court below, though it was cited to us here. In *Tractors*, defendants applied to set aside the pleadings there on the grounds that they were frivolous and vexatious. The High Court allowed the application holding that the action was bound to fail. The Federal Court, on appeal, regarded themselves as precluded from examining the evidence for

determining whether the action was bound to fail. The Privy Council held that the Federal Court was in error for not examining the evidence and deciding as to whether the action there was bound to fail, though the power to dismiss an action summarily was a drastic power. The Privy Council went through the evidence with a fine-tooth comb and decided to agree with the learned judge at the first instance and restored the High Court's decision. It is to be remembered that the High Court always has an inherent jurisdiction to prevent abuse of its process irrespective of whether it is expressly called for or not in an application under O 18 r 19 unless such application is limited solely to the ground that any pleading does not disclose a reasonable cause of action or defence as the case may be. (Emphasis added.)

The present case, as we have already said, has a long history. Part of that history includes an earlier action in which the respondent mounted a claim based on fraud against the appellant. It was titled as Suit No S 117/1982. An application to strike out that action failed at first instance. But it succeeded on appeal. In the Supreme Court, Wan Suleiman SCJ examined the preceding history of the litigation between the parties. See *Chung Khiaw Bank Ltd v Tio Chee Hing* [1987] 1 CLJ 531; [1987] CLJ (Rep) 81. The relevant passage in the judgment of His Lordship reads as follows:

> Appellants registered the first charge on August 14 1968 (Memorial No 92666) and the second charge on August 13 1986. Tio complains that the appellants had fraudulently obtained the first charge. In paras 9 and 10 of his statement of claim he set out the particulars of his charge of fraud alleging that the appellants had no intention of providing money under that charge, no account was opened for it and no money was paid under it. Appellants had, he added, consistently refused to provide evidence of money allegedly provided under the first charge, and had tricked him into executing the two charges and the appellants had made dishonest use of the first charge and purported to realise it even though no loan had been made under it. His Lordship noted that para 11 of the statement of claim alleged that appellants took unfair advantage of Tio's financial difficulties in executing the first and second charge and struck an unconscionable bargain. His Lordship then concluded the opinion of the court in the following terms:
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> > Having therefore given careful consideration to the whole history of this unfortunate affair we must, with respect, say that the learned judge had erred in not holding that this suit brought by the respondent Tio discloses no reasonable cause of action and is vexatious and an abuse of the process of the court. (Emphasis added.)

A comparison of the respondent's pleaded case in Suit S 117/1982 and in the present action reveals that they are in essence the same. What the respondent is attempting to do in the present case is to avoid liability in respect of the charge dated 14 August 1968 registered under Memorial No 92666 on the ground that he never received the funds promised by the appellant bank. If you read Wan Suleiman SCJ's judgment in *Chung Khiaw Bank Ltd v Tio Chee Hing*, you will find that the respondent had by that time made several similar attempts in other proceedings.

[5] The principle distilled from the above is that in an application of this nature, it is incumbent on the court to look at the history of the litigation between the litigants which I now proceed to do.

[6] As stated earlier the plaintiffs in 1979 started two suits. In the Zara suit, the plaintiffs and Sinsuran Sdn Bhd claimed against Datuk Syed Kechik ('DSK') and Zara Sdn Bhd for the enhancement of Zara's land at Likas Bay caused by DSK, in breach of his fiduciary duties, by siting the Sabah foundation building on Zara's land resulting in constructed causeway road to Zara's land.

[7] In the Banita suit, the plaintiff claimed against DSK and Banita for profits derived from the exploitation of the Wallace Bay Area under a special license issued to Banita in breach of DSK's fiduciary duties to the plaintiffs. The two suits were jointly heard and adjudicated by Ian Chin J which held that DSK had breached his fiduciary duties as the plaintiffs' officer and employee, and was liable to the plaintiffs for the following sums:

The Zara Suit

(a) Compensation for loss of profits amounting to RM10,375,504, together with costs and interest at 6%pa on the judgment sum from 20 December 1976 to 6 September 1999 and thereafter 8%pa till full payment.

The Banita suit

(a) Restitutionary award of RM6,417,915 and compensation for loss of profits in the sum of RM23,050,000;

(b) Compound interest at 8%pa on the sum of RM6,417,915 from 1 January 1978 and interest at 8%pa from the date of judgment on the balance of the judgment sum.

[8] Appeals were lodged by the defendants in the two suits and on 6 June 2003 the Court of Appeal delivered its decisions:

Zara suit

(a) The judgment of the High Court was set aside.

Banita suit

(a) The judgment of the High Court on the restitutionary award of RM6,417,915 was affirmed save and except that the compound interest element of 8%pa was set aside and replaced with a simple interest of 6%pa.

(b) The judgment of the High Court on the compensatory award of RM23,050,000 was set aside.

[9] Appeals were lodged to the Federal Court which on 25 August 2008 affirmed the decision of Court of Appeal. This judgment is reported in [2008] 5 MLJ 469; [2008] 3 CLJ 221.

[10] I now examine the pleadings of the Banita suit to determine what was the cause of action was. The statement of claim is exhibited in BHY21. The relevant paragraphs in my view are these:

> 8A In May and June 1974 for the purpose of assisting the said negotiating team in the said negotiations, a survey of the surrendered area including the Wallace Bay Area was carried out by the first plaintiffs and the results of the said survey were communicated in the first defendant.
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> 8B In the premises the knowledge acquired by the first defendant of the commercial value of a logging concession over (inter alia) the Wallace Bay Area was acquired by the first defendant in circumstances whereunder the first plaintiffs was entitled in equity to the benefit of the said knowledge.
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> 8C It was the duty of the first defendant owed at all material times to the first plaintiffs as Director thereof and owed after 29 June 1979 to the second plaintiff as managing director thereof (inter alia) to use his best endeavours to obtain for the first plaintiffs and/or the second plaintiffs the surrendered area (including Wallace Bay Area) for the purpose mentioned in para 5 hereof and further to use his said knowledge for the benefit of the plaintiffs.
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> 9 On the 29 July the second defendant applied to the State Government for the issue of a special timber license over the Wallace Bay area. The said application was procured by the first defendant or alternatively the same was made with his full knowledge and approval, and the said application was made without the knowledge or authority of the Board of Trustees of the first plaintiffs and without the authority of the Board of Director of the second plaintiffs.
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> 9A In procuring causing or permitting the said application to be made the first defendant was in breach of his fiduciary duty set out in para 8A hereof and was further in breach of his fiduciary duty of the plaintiffs and each of them thereby placing himself or permitting himself to be placed in a position in which his duty to the plaintiffs conflicted with his interest in the second defendant and application. Further, the first defendant in procuring causing or permitting the said application to be made was improperly making use of his own benefit of knowledge which in equity belonged to the fits plaintiffs

17 Whereof the plaintiffs claim —

(1) Against the first defendant:

(a) a declaration that the first defendant is accountable to the first and/or the second plaintiff for all profits made by him arising out of the issue of the special timber license over the Wallace Bay Area to the second defendants on account of such profits and on order for payment of the sum due thereon …

(2) Against the second defendants:

(d) a declaration that they held and have at all times held the special timber license issued to them over the Wallace Bay Area as constructive trustees for the first or second plaintiffs; an account of all profits made by them arising out of the issue to them of the said timber license; and an order for payment of the sum found due thereon; …

(3) Against both defendants:

(f) all such further accounts enquiries and directions as this Honorable court shall think fit.

[11] From the pleadings it can be seen that the plaintiffs' cause of action in that case was the breach of fiduciary duty on the part of DSK in failing to apply the special timber license for the Wallace Bay Area for the plaintiffs and as a consequence of which the plaintiffs claimed for all profits from the extraction of timber from Wallace Bay pursuant to the special timber license.

[12] I now examine the pleadings of this suit. The relevant paragraphs are these:

18 The RM6,579,305.22 (the proceeds) routed to the defendant in this way through Banita, DSK, Waverton and Zaraland came from the exploitation of forest land within an area covered by a special timber licence unlawfully obtained by DSK using Banita as his vehicle in breach of his fiduciary duties to the plaintiffs ('breach of duty').

19 It was held on 25 March 2008 in Civil Appeal No 02–14 of 2007(S) wherein the Federal Court was seized of the issue whether DSK was liable for breach of duty, and it concluded that he was, that the strict rule that a trustee must disgorge the entirety of any profit made in breach of fiduciary duty should not be relaxed in DSK's favour. The

proceeds formed part only of the still undisgorged profit of RM30,000,000 or thereabouts accuring to DSK from the breach.

20 In the premises as of 30 August 1976 the plaintiffs were entitled to trace the proceeds into the Zara project land and/or to be subrogated to the lender's rights in respect of the debt finance.

21 On 1 and 14 October 1976, the government of the State of Sabah gazette the compulsory purchase of the Zara Project Land.

22 On 29 October 1976 in Originating Summons No 69 of 1977 the defendant was awarded the sum of RM40,929,011 compensation by this court this sum reflecting the court's assessment of the value of the Zara Project land as at 14 October 1976 (the compensation).

23. In the premises the plaintiffs are entitled to trace the proceeds into the compensation and the interest from time to time accuring thereon (the compensation fund)

… And the plaintiffs claim:

1 A declaration that the plaintiffs are entitled to trace the proceeds into the compensation fund.

2 Quantification of the plaintiffs' interest in the compensation fund.

Alternatively

3 Payment of RM6,579,305.22

4 Compound interest.

[13] Counsel for the plaintiffs submits that this case is a 'perfectly straightforward claim for proprietary remedy' which is different to the cause of action in the Zara and Banita suit. It is also submitted that the cause of action is premised on the allegation that money which DSK made from his capacity as a director rightfully belonged to the plaintiffs, giving them the right to follow and to trace that money. This process is known as backwards tracing and the court is referred to Underhill and Hayton's, *Law of Trusts and Trustees* (17th Ed, 2006) which explains it as follows:

> 92.62 Secondly, if the trustee borrows £10,000 from a creditor, and uses this money to purchase an asset, and then uses money which he has misappropriated from the trust to pay off his debt, then the beneficiaries should be able to *trace backwards* through the payment of the debt into the asset which was purchased with the borrowed money, and identify the value inherent in the asset as the traceable proceeds of the value inherent in the trust property. In other words, the wrongdoing trustee should not be able to deny the beneficiaries' claims to be treated as if they had been original co-purchasers. This analysis, suggested by Professor Smith, has support in England at Court of Appeal level from Dillon LJ

A in *Bishopgate Investment Management v Homan* (although in the same case it was disapproved by Leggatt LJ), and from Scott VC in *Foskett v McKeown*. However, the latter case, Scott VC considered that it should only be possible to 'trace backwards' through a wrongdoing trustee's payment of a debt into the asset purchased with the borrowed money if it can be shown that it was the trustee's
B intention at the time of borrowing the money that he would later wrongfully use the trust money to repay his creditor. With respect, however, this proposed restriction, in favouring the trustee, seems likely to cause evidential difficulties in practice, and, in principle, there is no compelling reason why the beneficiaries' right to *backwards tracing* should be made contingent on the trustee's state of mind at the time of the original loan transaction. (Emphasis added.)
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[14] It is my view that, irrespective how the plaintiffs view their action in this case, both this suit and the Banita suit refer to the same breach of fiduciary duty committed by DSK as found by the Federal Court and to the
D same exploitation of the timber concession in the Wallace Bay Area in which the plaintiffs were awarded resitutionary damages of RM6,417,915 The 'proceeds from the compensation fund claimed' in this suit in my view must also refer to the 'all profits' claimed in the Banita suit. This is evident in para 9 of statement of claim where the plaintiffs allege that the proceeds (ie
E RM6,579,305.22) formed part of the still disgorged profit of RM30,000,000 accruing to DSK for the breach.

[15] That being the case and applying the principles set out in Tio Chee Hing, I find that this case is nothing but an attempt to litigate the same issue
F of law and facts which had been fully adjudicated. To allow this suit to proceed amounts to an attack on the judgment of the Federal Court which in law is not allowed unless the same had been obtained by fraud. It is not without significance that this suit was started on 21 October 2008 which is several months after the decision of the Federal Court in March 2008. I say
G so for the simple reason that if the plaintiffs had succeeded in their appeal in the Federal Court this suit would not have seen the light of day. Hence the only inference is that both this suit and the Banita suit concern the same cause of action and relief.

H

[16] Furthermore counsel of defendant had set out the various instances during the trial of the Banita and Zara suits where the plaintiffs' claim of proprietary claim based on the Waverton's issue were argued. Suffice for me just to refer to one interchange between the two Queen's counsel in exh
I BHY22:

Mann I want to see whether Banita's money was applied sufficient sum to enable a 3rd party to pay off Zara's sum on 31/8/1976. We know from what witness had told us that RM6,579,305.22 was alleged to have paid by Waverton to Zaraland in order to repay Zara's debt as at that date.

I am going to put to the witness that Waverton is in fact DSK's company and that the other transactions, like Liu Kai, Wai Bong, Waverton and the shares exchange of Zara and Zaraland and certain others. It is the same point as we had yesterday and that is where the inquiry would end. If witness can demonstrate from genuine documents that there can be no relation between the Banita's money expended by disbursement to DSK and the money that found its way possibly through Waverton through Zaraland, then he will have establish there is nothing in issue that Banita's license was secured in order to fund Zara and Zaraland at a time when it was short of fund and need other financial resources. That will explain the secrecy of Banita's application.

Cheeyong: Not an issue that had been explored in evidence. Not issue we had explored and not an issue which should be explored.

Mann: An issue relevant to the facts in issue.

Court: Since it is an issue relevant to the facts in issue, I allow examination to proceed on that line.

[17] This is plain evidence that the plaintiffs had tried to raise the same allegations in the trial in Banita and Zara suits. The Federal Court in its judgment must be deemed to have considered and rejected such allegations.

[18] It is also not without significance that the plaintiffs had on 1 April 1999 made an application to this court to reamend the amended statement of claim in which they had applied to join Zara as the third defendant. That proposed reamendment relates to a company 'Waverton Ltd', details of the allegation can be seen in exh BHY3. The allegations therein are similar to the allegations used in this suit. That application was disallowed by the High Court on 7 April 1999 and on an appeal to the Court of Appeal the decision of the High Court was affirmed on 10 May 2000. The judgment of the Court of Appeal is reported in [2003] 3 MLJ 328 where Siti Normah Yaakob JCA (as she then was) at p 336 held:

If indeed it is the contention of the respondents that the interests of justice would be met by allowing the proposed amendments so that all issues are identified and tried we consider that the timing of such a noble purpose should have been done much earlier and not at this very late stage when closing submissions were about to be made. As at 7 April 1999, when the amendments were refused that was the status of the trial in the court below. The respondents have explained that they were not able to compile comprehensive notices of cross appeal any earlier as they had under r 8(1) of the CA Rules ten days after service of the memorandum of appeal on them by the appellants within which to settle their notices of cross-appeal. Despite this they had taken the precaution of settling such notices in

advance after they were served with the appellants' notices of appeal but their original notices of cross-appeal were not as comprehensive as they wanted them to be.

We cannot accept that explanation to be a reasonable and satisfactory one as being the reason for the delay as the proposed amendments as far as we can see are not dependant on the memorandum of appeal. We fully appreciate that the four consolidated appeals contain many complex issues and involved voluminous documents but this fact alone is no excuse for the failure of the respondents to settle their notices of cross-appeal within the time limited by the CA Rules. This is so as the need to amend only arose after SSA had testified on behalf of the appellants and if we allow such amendments under those circumstances it would mean that there will be no finality in the proceedings particularly when the amendments asked for by the respondents seek to introduce a new cause of action against DSK and to add a new party into the proceedings. Such amendments, we say, would involve reopening the trial again as the parties have to go back to the High Court for the new cause of action to be tried and the new party to be heard on its defence. This is not a very healthy and a happy prospect to look forward to as more time and money will have to be expended in an already dragging twenty year old matter. Added to this is the claim by the respondents that Zara hold all the monetary benefits given to them by the appellants as a constructive trustee and liable to account, a cause of action that is already time barred under s 3 of the Sabah Limitation Ordinance 1952, which under item 97 of the schedule to the Act prescribes a six year limitation period from the date the right to sue accrued. On the matter of limitation, Hashim Yeop A Sani CJ, Malaya, had this to say in the case of *Credit Corporation (M) Bhd v Fong Tak Sin* [1991] 2 CLJ 871.

> The limitation law is promulgated for the primary object of discouraging plaintiffs from sleeping on their actions and more importantly, to have a definite end to litigation. This is in accord with the maxim interest *reipublicae ut sit finis litium* that in the interest of the state there must be an end to litigation. The rationale of the limitation law should be appreciated and enforced by the courts.

The respondents are not without any remedy as armed with the favourable evidence adduced at the joint trial they can still proceed against DSK and Zara in fresh proceedings independently of the two civil suits filed in 1979.

[19] Two reasons were given by Court of Appeal for refusing the application to reamend and they are that the plaintiffs had been guilty of delay in making the application to reamend and in any event the cause of action sought to be introduced is time barred. This Court of Appeal's decision not only binds me, it demands of me not to allow this suit to proceed as it offends the principle of res judicata. This is despite the fact that Zara was not a party in the Banita suit. It is undisputed that DSK is if you will the 'body, soul and mind' behind both Banita Sdn Bhd and Zara Sdn Bhd, hence they can be considered as his privies. It should not be forgotten that the plaintiffs had tried to include the defendant here in their application to re amend in 1999 which was rejected. Authority for my view can be found in the

judgments of Peh Swee Chin FCJ in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* and Abdoolcader SCJ in *Superintendent of Pudu Prison & Ors v Sim Kie Chon* [1986] 1 MLJ 494 (SC).

[20] Counsel for the plaintiffs had urged me to note what Her Ladyship said about fresh proceedings based on favorable evidence. It is the plaintiffs' stand that the new evidence discovered from DSK's brother at the trial during cross-examination gave support for the tracing remedy. The plaintiffs as pointed out earlier attempted to amend their statement of claim to cater for the tracing order but leave was not granted by the High Court, a decision affirmed by Court of Appeal. To sustain counsel's contention in my view means that Her Ladyship had in fact contradicted herself which is not a reasonable deduction to form. I agree with counsel for the defendant that what Her Ladyship meant was in respect to other evidence apart other than the evidence relating to Waverton Ltd. Again it would not be incorrect for me to surmise that had that re amendment be approved by the courts this suit would not have seen the light of day.

[21] A case with similar factual matrix on such evidence is the case of *North West Water Ltd v Binnie ua Partners (a firm)* [1990] 3 All ER 547. The facts as set out in the head notes of the report were these. A water authority commissioned a firm of consultant engineers to design and supervise the construction by contractors of an underground tunnel link and valve house to take water from one river to another by means of 12km tunnel and pumping system. The scheme prompted protests from local residents which caused the plaintiff to arrange a meeting of the local residents at the valve house in order to demonstrate the operation of the scheme. During the meeting an explosion occurred because, unknown to anyone, the valve house had filled with methane gas which ignited. Six people were killed and the rest injured. A number of victims or their personal representatives brought an action (the first action) claiming damages for personal injury or death against the water authority, the contractors who constructed the system and the consultant engineers. By their defence the water authority claimed that the explosion had been caused by the consultant engineers' negligence. At the trial of the action the judge held that all three defendants were to blame and apportioned liability between them as to 55% against the consultant engineers, 30% against the water authority and 15% against the contractors. All three defendants appealed to the Court of Appeal, which allowed the appeals of the water authority and the contractors and held that the consultant engineers were wholly to blame. In separate proceedings (the second action) the water authority issued proceedings against the consultant engineers seeking to recover the damage to the tunnel system caused by the explosion, estimated to be £2m. The water authority alleged that the damage had been caused by the consultant engineers' negligence and/or breach of

contract in designing and/or constructing and/or supervising the link system and further alleged that as between the water authority and the consultant engineers the issue of negligence had been decided in the first action and was res judicata and that the consultant engineers' defence denying negligence was an abuse of process should be struck out. The question whether the consultant engineers were estopped from denying negligence and whether their defence should be struck out was tried as a preliminary issue.

[22] The court upheld the contention of the water authority on the ground that the first action and second action related to identical facts and dependent on the same evidence. The fact that the parties in the second action are different to those in the first action was of no significance as the issue of negligence had already been determined against the consultant engineers in the first action and they are not allowed to relitigate the same issue again. The court further held that not only the principle of issue estoppels applied but it was also an abuse of process to allow the issue to be relitigated. What is of interest to this case is that in that case there was a seismic investigation report commissioned by the water authority which was in existence at the time of trial but was not admitted as an exhibit by either the water authority or the plaintiffs there. The consultant engineer sought leave to admit that report on the ninth day of the trial but was not given leave to do so on the ground that the report was not necessary for fair determination of the issue and it would seriously prejudice the plaintiff. Attempt was made to admit that report in the second action which raises the issue of whether the use of the report amount to an abuse of process or give rise to an issue estoppels. Drake J had analysed the law on this area in some detail and it would be beneficial that I set out the analysis:

> Counsel for Binnies (consultant engineer) submits that the ECL report is vital to Binnies' defence in the present action and he relies on the judgment of Rose J and of Russell LJ to demonstrate this. Counsel for Binnies disagrees and submits that it is at best very questionable whether the report would be directly relevant to the issues between Binnies and the water authority.
>
> What is the correct test to be applied to consider whether fresh evidence should be admitted which will have the effect of overcoming issue estoppels or what would otherwise amount to an attempt to relitigate the same issue and thus amount to an abuse of process?
>
> Counsel for the water authority relies on the test propounded by Earl Cairns LC in *Phosphate Sewage Co v Molleson* (1879) 4 App Cas 801 at p 814, that is to say the new evidence must be such as 'entirely changes the aspect of the case ... and was not and could not by reasonable diligence have been ascertained before …'. Counsel for Binnies denies that this is the correct test. He submits that the court should look at the new evidence and the reasons why it was not adduced in the previous proceedings and decide whether the new facts are such that circumstances make it fair and just that the decided issues between the parties should be reopened. For that proposition he relies on a passage in the judgment of Lord

Denning MR in *Tebbutt v Haynes* [1981] 2 All ER 238 at p 242 and the observations of Sir Nicolas Browne-Wilkinsion VC in *Arnold v National Westminster Bank Plc* [1988] 3 All ER 977 at p 982; [1989] Ch 63 at p 69 where he said:

> … there are circumstances in issue estoppels where the injustice of not allowing the matter to be relitigated outweighs the hardship to the successful party in the first action in having to relitigate the point. The rules applicable to issue estoppels and the proper exceptions to it are in course of development. See *Carl-Zeiss-Stiftung v Rayner & Keeler Ltd (No 2)* [1966] 2 All ER 536 at p 554; [1967] 1 AC 853 at p 917. The authorities show that the exception applying to 'special circumstances' is designed to ensure that where justice requires the non application of issue estoppel, it should not apply. See *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581 at p 590. In the *Carl-Zeiss* case [1966] 2 All ER 536 at p 573; [1967] 1 AC 853 at p 947 Lord Upjohn said: 'All estoppels are not odious but must be applied so as to work justice and not injustice, and I think that the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind'.

I have no doubt that, in every case where issue estoppel or an abuse of process is being considered against the wish of a party to introduce fresh evidence, the overall justice of the decision to be made should be an important, and it may be, an overriding consideration. But I do not think that Lord Denning MR or Sir Nicolas Browne-Wilkinson VC in either of the cases I have just referred to was suggesting that a general test of fairness or hardship should be substituted for the long standing test stated by Earl Cairns LC in the *Phosphate Sewage* case. Indeed in *Tebbutt v Haynes* Lord Denning MR, in making the observations relied on by counsel for Binnies had, in the very same passage, referred to his observations in *McIlkenny v Chief Constable of West Midlands Police Force* [1980] 2 All ER 227 at p 237; [1980] 1 QB 283 at p 319 where he had expressly relied on the Phosphate Sewage test and observed that this test is a much stricter one than is applied when considering fresh evidence on an appeal, that is to say that the fresh evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive (see *Ladd v Marshall* [1954] 3 All ER 745 at p 746; [1954] 1 WLR 1489 at p 1491).

Counsel for Binnies also referred to observations by Lord Diplock in *Hunter v Chief Constabel of West Midlands* [1981] 3 All ER 727; [1982] AC 529 where he reaffirmed what he said about issue estoppel in *Mills v Cooper* [1967] 2 All ER 100 at p 104, [1967] 2 QB 459 at p 469, where he had stated that a previously decided issue is binding on the parties:

> unless further material which is relevant to the correctness or incorrectness of the assertion and could not by reasonable diligence have been adduced by that party in the previous proceedings has since become available to him.

In *Mills v Cooper* fresh evidence was not directly in issue. But in *Hunter*'s case Lord Diplock directly considered the circumstances in which fresh evidence may be admitted so as to make an exception to what otherwise would amount to an abuse of process of the court. Agreeing with what Goff LJ had stated in the Court of Appeal

A he stated clearly that the test to be applied is the more rigorous Phosphate Sewage test rather than that derived from *Ladd v Marshall*.

So in this case I think it right to apply the Phosphate Sewage test. Doing so, I find that Binnies fail. I do not think that they can show that the ECL report entirely changes any aspects of the case. On the contrary, I am satisfied by the submissions B for the water authority that it does not do so.

In my judgment Binnies also fail on the other limb of the Phosphate Sewage test. I think it is clear that the ECL report was available to them at the Lancaster trial and that it was solely due to their own default in not applying before the trial for leave C to adduce that evidence that their application, made only on the ninth day of the trial, failed.

Thus I hold (1) that the attempt by Binnies to relitigate issues already decided is an abuse of the process of the court, (2) that the ECL report does not enable them to avoid that decision and (3) that they should not be permitted now to plead D contributory negligence which, in any event, has been covered by the Lancaster trial and the subsequent appeal.

[23] Similarly it could be said the plaintiffs' attempt to use the evidence E arising from the cross-examination in the Banita and Zara trial does not 'entirely change any aspects of the case'.

[24] For reasons stated above I find that the plaintiffs' claim is nothing but an attempt to relitigate issues which had been adjudicated and hence hold the F plaintiffs' suit is barred by the principle of res judicata and/or issue estoppel and an abuse of court process.

Issue 2: *Whether irrespective of the answer to (1), the plaintiff's claim is time barred?*

G

[25] This issue is settled by the decision of the Court of Appeal which held that the proposed re amendment was time barred. Not only am I bound by H that decision, I agree with it.

[26] Before I conclude I should say a few words on the principle of laches. There is no dispute that the plaintiffs' action against the defendant is based on what had happened in the 1970s. This suit if allowed to proceed will mean I that the plaintiffs had slept upon their rights for nearly 39 years. As what the plaintiffs are seeking an equitable remedy in this suit, rule of equity demands a plaintiff to prosecute his claim without undue delay. On this, Raja Azlan Shah J (as he then was) in *Re Len Chee Omnibus Co Ltd Chin Sow Lan v Lee Che Omnibus Co Ltd & Ors* [1969] 2 MLJ 202 had this to say:

… In the words of Lord Camden LC in *Smith v Clay* (1767) 3 Bro CC 639n at p 640n a court of equity 'has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence; where these are wanting, the court is passive, and does nothing'.

[27] In *Yong Nyee Fan & Sons Sdn Bhd v Kim Guan & Co Sdn Bhd* [1979] 1 MLJ 182, Hashim Yeop Sani J stated as follows:

Thus the main question left to be asked is whether anybody has been prejudiced by the delay. On this Lord Campbell LC said in *Archbold v Scully* 9 HL Cases 371:

> The real question in the case seems to me to be, whether the appellant is barred by the lapse of time between 1835 and 1857 when his bill or cause petition was filed. If any new rights had been created in this interval, or if anyone would be prejudiced by the delay, that is, by the appellant being now enabled to make good his claim, I should clearly be of opinion that he is barred by laches or acquiescence or whatever name may be given to his long sleep over his rights.

[28] The rationale behind the rule of laches is simple and that is because of the lapse of the long period of time, the defendant had been prejudiced beyond repair in its ability to defend this suit. DSK the sole directing mind of Zara Sdn Bhd and Banita Sdn Bhd is now deceased. Further, needless to say the records of over 30 years would be incomplete, lost or destroyed. The staff who had charged of these records had changed and moved on. The first difficulty for the defendant would be to contact these potential witnesses. The second difficulty again for the defendant would be their ability to remember events which had happened over 30 years ago. The third difficulty for both the plaintiffs and the defendant would be the ability to obtain banking records of banks and Waverton which are not within the jurisdiction of the courts in Malaysia. The fourth difficulty would be the ability of the plaintiff to prosecute their case as they solely rely on the evidence of the defendant and its privies. They from the affidavit evidence had done nothing in the form of discovery since 1999 which lead me to infer that they may be clutching straw. In *Negara Properties Sdn Bhd v Akitek Bersekutu Malaysia (sued as a firm) & Ors* [1995] 2 MLJ 185, Sinnadurai J had this to say in respect of fair trial:

(a) Fair trial

> It is generally said that if the trial is based largely on oral evidence of the parties and their witnesses, and the long delay would have impaired the memory of the witnesses, there was in such cases a substantial risk that it was not possible to have a fair trial of the issues in the action. Similarly in situations where the key witnesses have died or could not be traced. If on the

A other hand, the issues in the action were based essentially on documentary evidence, the delay may not give rise to a risk that it was not possible to have a fair trial.

(b) Prejudice

B If the defendant is unable to show that the delay will give rise to a substantial risk that it was not possible to have a fair trial, the defendant may, if he has already established inordinate and inexcusable delay on the part of the plaintiff, succeed in setting aside the action if he establishes that the delay has caused or is likely to cause him serious prejudice.

C

[29] In the present case, there is no explanation by the plaintiffs as to why they have taken so long to prosecute their case in the manner they want to do now. The history of litigations between the parties in this case lead me to the conclusion that the plaintiffs were hoping that they would succeed in the D Banita and Zara suits and if they had they would not have to file this suit. This thinking only means one thing and that is this suit is an attempt to relitigate issues which they had failed.

[30] For all the reasons stated above, I allow the defendant's application to E strike out the plaintiffs' writ and statement of claim against it with costs.

[31] Order accordingly.

Application allowed with costs.

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Reported by Kohila Nesan

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